

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

AARON HANSEN, ET AL.,	)	CASE NO: 2:13-CV-00242
	)	
Plaintiffs,	)	CIVIL
	)	
vs.	)	Corpus Christi, Texas
	)	
TOTAL SCREEN SOLUTIONS, INC.,	)	Thursday, April 3, 2014
ET AL,	)	
	)	(1:28 p.m. to 2:24 p.m.)
Defendants.	)	

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CIVIL MOTION HEARING

BEFORE THE HONORABLE NELVA GONZALES RAMOS,  
UNITED STATES DISTRICT JUDGE

Appearances:	See Next Page
Court Recorder:	Arlene Benavidez
Case Manager:	Brandy Cortez
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**APPEARANCES FOR:**

**Plaintiffs:**

DAVE J. MOULTON, ESQ.  
Bruckner, Burch, P.L.L.C.  
8 Greenway Plaza  
Suite 1500  
Houston, TX 77046

**Defendants:**

DANIEL DOUGLAS PIPITONE, ESQ.  
KENNETH WAYNE BULLOCK, II, ESQ.  
Munsch, Hardt, Kopf, and Harr, P.C.  
700 Milam  
Suite 2700  
Houston, TX 77002

**Also present:**

Gary Mills

1       Corpus Christi, Texas; Thursday, April 3, 2014; 1:28 p.m.

2                               (Call to Order)

3               **THE COURT:** Court calls Cause Number 2-13-242, *Hansen*  
4 *versus Total Screen Solutions, et al.* Plaintiff will announce  
5 for the record.

6               **MR. MOULTON:** Yes, your Honor. David Moulton for the  
7 plaintiffs.

8               **MR. PIPITONE:** Your Honor, I'm Dan Pipitone for the  
9 defendants, and if I may, your Honor, one of the defendants,  
10 Gary Mills, is here, if I can introduce him to the Court.

11               **THE COURT:** Okay. Good afternoon.

12               **MR. MILLS:** Glad to meet you, your Honor.

13               **THE COURT:** Nice to meet you. You can have a seat.  
14 We've had a hearing on the motion for conditional  
15 certification, I guess a little over two weeks ago, and I've  
16 received some further briefing, which I -- I did consider. Is  
17 there anything further on that motion from the plaintiffs?

18               **MR. MOULTON:** On the motion for the conditional  
19 certification? Yes, your Honor. We'd like to cover a few  
20 things --

21               **THE COURT:** Okay.

22               **MR. MOULTON:** -- if that's all right.

23               **THE COURT:** And I don't need a rehash, and a lot of  
24 the briefing that was provided was repetitive and cumulative  
25 argument, but I did look at everything already, so if you want

1 to make some minor points, that's okay.

2           **MR. MOULTON:** Sure. Okay. So, employee  
3 misclassification is a -- is a big problem. You know, the  
4 Texas Tribune had an article about it finding that it's a  
5 breeding ground for payroll and tax fraud. Many -- what  
6 happens when people aren't paid their wages properly is that  
7 taxes aren't collected either. More than 54 million lost  
8 unemployment tax revenue just in construction industry in  
9 Texas.

10           **THE COURT:** Okay. That's not relevant, really, to  
11 the issue here.

12           **MR. MOULTON:** Okay.

13           **THE COURT:** I don't think.

14           **MR. MOULTON:** Right. Well, the -- what we wanted to  
15 show, your Honor, is that the Government agencies are looking  
16 at this problem, including the Department of Labor. They have  
17 the initiative to actually go after the oil and gas industry.  
18 There are lots more people working in that industry and a  
19 much -- but the percentage of workers who are being classified  
20 as employees is going down. So, they actually have an  
21 initiative to actually go and look at those employees and try  
22 to -- to remedy the problem.

23           Now, one of the things that's come up, too, is that,  
24 basically, what we're looking at with Total Screen Solutions is  
25 a potential joint employment situation. They are basically a

1 staffing company. They are providing these solids control  
2 technicians to the rigs to remove the solid portion out of the  
3 drilling fluid. These workers work on the side of the rig and,  
4 you know, the -- the Family Medical Leave Act has this reg.,  
5 it's also by the Department of Labor and uses the same standard  
6 for employment as the FLSA. And they found in these situations  
7 joint employment will ordinarily be found to exist when a  
8 temporary placement agency supplies employees to a second  
9 employer.

10 Now, when you get to conditional certification, which  
11 is the stage that we're at, courts routinely do not go into the  
12 details of the economic realities test to find out, you know --  
13 to make a determination either way. What they're looking at is  
14 to see if they're similarly situated. And in this case we do  
15 have them similarly situated. They're classified the same way  
16 without regard to which oil company they're assigned to;  
17 they're paid the same way; they have the same job duties. It's  
18 a very lenient standard.

19 At this point discovery is very limited. We've only  
20 had some initial paper discovery. There is a pending motion to  
21 compel to help get that initial set done. There has only been  
22 one deposition. And what we're asking here is the Court to  
23 notify the employees, let them know about this case, give them  
24 the chance to join.

25 Now, when you look at joint employment situations,

1 when you go to companies that are actually staffing companies  
2 like the company that was mentioned in that reg., there's  
3 these -- they'll send you these charts and explain how their  
4 business works. So, usually your staffing companies are called  
5 PEO's, or professional employment organizations, and they have  
6 a deal with an employee and also a deal with a customer, the  
7 worksite employer. And normally when they're assigned to a  
8 worksite employer the worksite employer provides direction and  
9 control, determines compensation and conducts performance  
10 reviews, just (indiscernible) the general situation here. And  
11 the PEO, or the staffing company, handles the administration;  
12 payroll and benefits, provides HR services, and assists with  
13 employer compliance. Like we just read in the reg., this  
14 situation ordinarily will cause a joint employment situation  
15 where the employee is an employee of both the staffing company  
16 and the client worksite employer. So, that's the general  
17 situation you have that you will find employment, as an  
18 ordinary course of a matter.

19 Now, if we just modify this chart to more like our  
20 situation, the sit hands have a relationship with Total Screen  
21 Solutions. They also have a relationship with the oil company  
22 because they're working on the oil company site. But we know  
23 from *Gray versus Powers*, which was cited in our brief, that the  
24 Court has to look at each relationship. These sit hands may be  
25 employed by both. We -- we're not asking the Court to evaluate

1 the oil company relationship. We haven't sued the oil  
2 companies; they're not here. We're not -- whether or not there  
3 are some elements there that are -- that relate to sit hands is  
4 not part of the analysis of whether sit hands independently --  
5 if I can get this pen to work -- are employees of Total Screen  
6 Solutions, because that's the issue. And when we look at the  
7 Total Screen Solutions relationship with the employees, we see  
8 that Total Screen Solutions, in fact, administers payroll and  
9 benefits; they handle all of the payroll. They process  
10 payroll; they issue checks. There is nothing odd or irregular  
11 about this -- about their -- their pay. They turn in the --  
12 they call them invoices. It's a little bit grayed out at top,  
13 but you can see January 31st; these invoices submitted  
14 bimonthly. And they're just simple; they're sent right to  
15 bills to do -- Total Screen Solutions with the total amount,  
16 and then Total Screen Solutions handles the checks, pays them.

17 Total Screen Solutions does the hiring and firing.  
18 The oil company has nothing to do with hiring and firing in  
19 this case. The managers of Total Screen Solutions do that.  
20 They all -- the managers of Total Screen Solutions also provide  
21 the follow-up and go out and visit, and they also send service  
22 techs to visit and -- and handle problems with the -- and  
23 complaints with the sit hands. Total Screen Solutions also  
24 assists the oil company with compliance. They -- they make  
25 sure the workers have required certifications and are safety

1 trained. Total Screen Solutions determines compensation, not  
2 the oil company. I move them over here because they -- the oil  
3 company is not doing that in our case. And Total Screen  
4 Solutions also does performance reviews. Total Screen  
5 Solutions fires people; it talks to them when they think  
6 they're making mistakes.

7           These are -- these are the things that we're finding  
8 out in discovery. And, so, the employment factors as between a  
9 joint employment situation stack up on Total Screen Solutions.  
10 Under the reg., just the three green ones would have been  
11 enough; but we have more.

12           Now, determines direction and control; that's the  
13 issue that seems to be the hottest issue between us. Total  
14 Screens claims that because the sit hands are working on the  
15 oil site on a rig that just the oil company is the only company  
16 that's providing the direction and control. But that's not  
17 accurate, because there's more to control than just saying we  
18 need -- you know, "We need you to move that pile of cuttings,"  
19 or, you know, "You can go now because we're not going to be  
20 drilling for a little while." And the elements of control that  
21 we see that are -- only come from Total Screen Solutions are  
22 the sit hands are hired directly by the Total Screen Solutions  
23 managers. TSS trains its new sit hands; it assigns them to a  
24 more experienced hand. The managers are assigned -- I'm sorry;  
25 the managers assign the sit hands to work on particular rigs,



1 assign them as either a day or night hand. And these rigs  
2 operate 6:00 to 6:00. If you're up -- if you're assigned a day  
3 hand, you're working 6:00 a.m. to 6:00 p.m. If you're assigned  
4 a night hand, you're working from 6:00 p.m. to 6:00 a.m. So,  
5 you're automatically told your schedule.

6 TSS does not allow them to work for other companies.  
7 That's a very significant control factor. They're not allowed  
8 to refuse rig assignments. You know, in our original motion  
9 Lauterbach testified about how -- the main plaintiff testified  
10 about how he was fired for refusing a rig assignment. The  
11 managers, TSS managers, have the power to hire and fire sit  
12 hands and regularly exercise that authority. Their  
13 declarations talked about several instances where sit hands  
14 were fired.

15 The sit hands maintain that they're required to  
16 remain on the site unless given permission to leave. Now,  
17 apparently, sometimes a commission does come from the oil  
18 company, like if they're not -- you know, if they are -- if  
19 they need something from town or if they're not drilling and  
20 you can let them leave, they have -- they have permission from  
21 Total Screen Solutions that if that's the case they can go.

22 The managers and the service techs are making regular  
23 visits. It's usually about once or twice a week -- I'm sorry;  
24 once every week or two that they get a visit from Total Screen  
25 Solutions, and Total Screen Solutions will restock them with

1 all their materials, restock their supplies, and point out  
2 things they missed.

3           Total Screen Solutions requires the sit hands to fill  
4 out these daily report forms. And this is a form created by  
5 Total Screen Solutions that tells them exactly what they need  
6 to report. And these guys will write on here. This is from  
7 Michael Guthrie, one of the opt-ins, and says he's monitoring  
8 equipment, cleaning the screens, washing a track hoe; he --  
9 again, monitoring the equipment, washed the screens and pump  
10 recovery tank, greased all the centrifuges and pumps, load  
11 trucks. He also details the number of screens that were used,  
12 and all these screens, all this equipment, is provided by Total  
13 Screen Solutions.

14           He is given -- to bill the exact costs right there,  
15 he is given a price list. Now, here we go. He was given a  
16 price list; Total Screen Solutions price list. Centrifuges,  
17 \$400. Dryer shakers, \$200 each day. Service techs, \$600 a  
18 day. Open top tank, \$65 a day. The rig shaker screens, \$350 a  
19 day. Vortex dryer shaker screens, 410 each. The manager's  
20 phone number is at the bottom of this, Nick Mills. He's one of  
21 the owners. These are prices set by Total Screen Solutions.  
22 They control the profit, the economic opportunity here, because  
23 if a guy is in business for himself providing solids control  
24 equipment, he would have his own price list and provide his own  
25 stuff. But that's not the case. Total Screen Solutions

1 provides everything.

2           Total Screen Solutions also sets the pay rates. Now,  
3 you know, we have conflicting opinions about this. People ask  
4 for raises, and sometimes they get them. That's just like with  
5 TSS. Now, what's not -- what's -- and, so, whether you call it  
6 a negotiation or whether you call it just asking for a raise  
7 and getting a raise, I don't think is really significant. What  
8 I think is more significant is that once one of these workers  
9 gets a raise, he stays at that rate from rig to rig. He does  
10 not have to renegotiate his price -- his -- his day rate every  
11 time he moves. It stays that way. And that's because Total  
12 Screen Solutions is setting these and approving them. The oil  
13 company doesn't care what they're getting paid. All they care  
14 about is the price that they have to pay Total Screen Solutions  
15 for having that guy out there.

16           Total Screen Solutions did not allow the workers to  
17 hire people to work in their stead; they did not allow them to  
18 even choose their -- their relief work. They can't hire their  
19 own workers and kind of expand out underneath Total Screen  
20 Solutions. They have to provide their work personally.

21           Now, Total Screen Solutions, the -- you know, that  
22 price list we showed here, our guys testified to what they  
23 believe the cost of these different things are. And they think  
24 that that -- they think it's in the hundreds of thousands of  
25 dollars. And there's -- some of the things that TSS provides

1 aren't on this list, like the track hoes and things like that,  
2 which are, you know, big pieces of equipment. They think it  
3 runs about 700 to 750 thousand dollars' worth of equipment, and  
4 the sit hands don't really provide anything. Total Screen  
5 Solutions even provides safety equipment for them. They are  
6 like employees in the sense that they have to pay for gas to  
7 get out to the site. They may occasionally buy a wrench, but  
8 this is -- there is nothing specialized that they need for  
9 their job; it's mostly just be there.

10           Plaintiffs are also not responsible for exercising  
11 initiative in a business sense. I mean, they're not the ones  
12 out there getting the clients. That's what Total Screen  
13 Solutions does. Total Screen Solutions gets the companies to  
14 contract with them to provide the sit hands. The sit hands  
15 don't do that. All they -- sit hands get a call from Total  
16 Screen Solutions and they go. That's what they do. So, this  
17 is similar to *Hopkins versus Cornerstone America*. Total Screen  
18 Solutions controls the -- the meaningful aspects of the  
19 business model such that the sit hands cannot -- they're not  
20 their own economic entities, they're not separate.

21           Now, the control factors we just talked about; all  
22 those control factors don't matter about what oil company  
23 you're assigned to, doesn't matter which company man is out  
24 there, doesn't matter what he's -- what that company man is  
25 telling you or not telling you what to do. And -- and, again,

1 that's just like *Gray versus Powers* requires the Court, if  
2 we're going to go in this analysis, it's going to -- it  
3 requires the Court to look at the -- the employment  
4 relationship that's alleged, which is the sit hands and Total  
5 Screen Solutions. And, so, what oil company men say apart from  
6 that just isn't part of this; it's a distraction. That's the  
7 reason why most of the cases you'll see don't go into a whole  
8 lot about what some third party that's not before the Court is  
9 telling the workers, is because they're doing their job right,  
10 which is to look at the relationship that's alleged, the  
11 employment relationship that's alleged.

12 Now, let's see. One of the things that's -- that I  
13 think is really a key thing here, too, is that the sit hands  
14 have worked for Total Screen Solutions for years. You know,  
15 Plaintiff Lauterbach was asked in his deposition:

16 "Was there ever a time that you considered working  
17 for another company that provided the same  
18 type of --"

19 And he interrupts: "No."

20 "-- opportunity that Total Screen Solutions  
21 provided?"

22 He says:

23 "I never called another company, never talked to  
24 another company, other than Stage Three when we got  
25 kicked off 43, asking me to go work for them when

1           they would keep me on 43 running their equipment."

2           But then that never panned out. So, during the time  
3 he worked for Total Screen Solutions, it was not only a long  
4 time; it was exclusive. And that's what the courts are looking  
5 at when you -- when you evaluate permanency. He's also on call  
6 all the time. Once they -- he's asked:

7           "Okay. Well, once they set his time, how soon would  
8 you have to go?"

9           We're talking about how soon he has to go out and be  
10 at the rig. And his answer is:

11          "As soon as the rig was ready for us."

12          "Okay. Right. Then, how much lead advance notice?

13          "Did I need?

14          "Yeah.

15          "They could call me that hour, and within two or  
16 three hours I'd be on the road heading that way."

17          The sit hands are not responsible for lost or damaged  
18 equipment. There is no loss for downtime. There is no  
19 opportunity for them to shop for lower prices and charge more  
20 because they don't provide the materials, the consumables, the  
21 equipment. There is no bidding process for the sit hands.  
22 They have constant day rates. And like we talked about before,  
23 prices are already set by Total Screen Solutions. So is the  
24 location. The location is set by Total Screen Solutions, and  
25 that's important because to the extent that you may look at

1 whether or not gasoline is considered a business investment in  
2 solids control, which we don't think it is, but to the extent  
3 that a court would be looking at that, if Total Screen  
4 Solutions sets the place where you're going to work, that  
5 will -- that has the biggest effect on the amount that you will  
6 have to pay in gas and other costs to get there. And, you  
7 know, these sit hands don't even have to provide lodging. They  
8 have no skin in the game. The only skin they have is, is to  
9 work a day and get paid, which -- which is just like an  
10 ordinary employee.

11           This isn't really skilled work. There are guys that,  
12 you know, that have been -- testified that -- well, that have  
13 come up in the testimony that used to be pizza delivery guys,  
14 and they have no experience in the oilfield, and they show up  
15 and they can run these machines. So, let's look at some  
16 deposition testimony.

17           "So, there can be a pretty big difference in the  
18 knowledge and the skills and experience between the  
19 sit hands, the day hands, and night hands?"

20           That's the question.

21           "There could be, but it didn't take much experience,  
22 I mean, to run these machines; it really didn't. All  
23 you had to do was start them and run them. Of  
24 course, Don and them told us how to run them. I  
25 mean, it didn't take much to run them. All you had

1 to do was start them."

2 Now, how to run them was a whole other game; to do  
3 the job didn't take much. I mean, the hardest thing probably  
4 about it for these hands was running the track hoe. That  
5 could -- they could be -- and, then, another question:

6 "They could be a day trader on the stock market if  
7 they wanted; they could be a pizza delivery boy, like  
8 we had a couple of those."

9 "That were sit hands? That they were -- that's what  
10 they were doing?

11 "Yeah, they were pizza delivery boys beforehand."

12 So, we're not talking -- you know, I think on -- when  
13 you're looking at the kind of oilfield workers, welding has not  
14 been held to be skilled unless it's pipeline welding, which is,  
15 I think, semi-skilled. Running solids control equipment is --  
16 is like welding or less skilled.

17 Now, we can look at the other aspects of this  
18 relationship, too; for example, whether or not it's integral.  
19 Total Screen Solutions is a screen solutions company. They  
20 provide the screens and they provide the people to get drilling  
21 fluid cleaned up. And that's exactly what the sit hands do.  
22 They do Total Screen Solutions' business. They are integral  
23 into that. They -- Total Screen Solutions also provides  
24 advertising, marketing, insurance. Sit hands provide none of  
25 that. All of these things that we're talking about don't have



1 anything to do with whether a company man tells you to clean  
2 that up, do this, go home. Those are not -- those are, like,  
3 day-to-day supervision items, which is expected from a worksite  
4 employer, but are not required as part of the analysis between  
5 sit hands and Total Screen Solutions, in fact, have nothing to  
6 do with it.

7           So, we looked at -- you know, we've pointed out  
8 several cases where -- basically, it's going to be a staffing  
9 company case is where you're going to see this situation. And  
10 we detailed some of those. I think *Heeg versus Adams-Harris* --  
11 it's a case that our firm did in front of Judge Rosenthal.  
12 That one's a interesting case because Heeg -- or Adams-Harris  
13 was a staffing company. And that staffing company assigned  
14 these, basically, folks that did sort of accounting bookkeeping  
15 work to work at all sorts of clients' locations, in their  
16 locations, subject to the control of the people in those  
17 locations. It's not just about that they're in different  
18 places; they're actually working the hours and the -- and the  
19 job duties that the clients want. And there's still  
20 conditional certification granted there, and part of the reason  
21 why is, not only did Judge Rosenthal not really get into the  
22 economic realities factors, but she also recognized that what's  
23 happening outside of the analysis between whether or not  
24 they're employees of this company or not doesn't impact that  
25 analysis, because we're not alleging a joint employment

1 relationship. And even if we were, *Gray versus Power* says we'd  
2 still have to look at the individual relationship. We'd have  
3 to look at how sit hands relate to TSS.

4           *Sealey versus Emcare*. That was a case that your  
5 Honor handled. In that case the opinion for granting  
6 conditional certification, as the defendants pointed out,  
7 doesn't exactly state -- say why, but when you look at the  
8 facts, it's very similar. We have workers assigned to multiple  
9 hospitals, have to follow those hospitals' procedures, those  
10 hospitals' hours, subject to those -- those hospitals'  
11 direction and control. And that wasn't part of the analysis  
12 about for conditional certification, because the analysis is  
13 whether or not the -- the workers were similarly situated with  
14 respect to the employer at issue, which is Emcare.

15           *Solis versus Gate Guard*. I think that's an  
16 interesting case. That case started with the Department of  
17 Labor doing an investigation and bringing an action to recover  
18 the overtime for all of these gate guards. The Department of  
19 Labor can basically bring, like, a Rule 23. They get to  
20 represent everybody. They brought it in -- in Corpus. And  
21 about the same time, because there had been a bad ruling for  
22 gate guards in Victoria, the Gate Guard company sued for a  
23 declaratory action, that they were complying with the FLSA in  
24 Victoria, got the case yanked out of Corpus and into Victoria  
25 so that all of it was combined. But it wasn't a case on

1 conditional certification, but what it was, was a class-wide  
2 determination on the merits at summary judgment for workers who  
3 are, in this aspect, similar, but they're assigned to different  
4 oil companies and subject to their rules and their hours.  
5 Okay? And that court made that determination that they were  
6 all actually not employees without considering that, because  
7 that wasn't the analysis. The analysis was not what the  
8 company men do or don't do; it's about whether or not with  
9 respect to Gate Guard were they employees.

10 Now, we've also seen a similar situation come up with  
11 the catastrophe cases in the Eastern District of Louisiana, in  
12 *Prejean*. It's the same issue. The defendants are saying:  
13 look, all these oil spill workers are part of this emergency  
14 management system and they are -- depending on where they're  
15 assigned to, they have to listen to these different companies,  
16 whether it's Coast Guard or if it's, you know, Swift or  
17 these -- the response group, or these other companies that were  
18 also involved in the spill. And the court didn't go into that.  
19 That's not the relationship before the court. The court looked  
20 at what control does exist between *Prejean* and the class  
21 members and O'Brien's, which was the employer at issue, and  
22 found that there were some control issue -- control factors  
23 that were common. And that's the reason why you see that in  
24 the opinion, that they say they were controlled by O'Brien's.  
25 And you could -- the Court can do the same thing here, can look

1 at sit hands are controlled by Total Screen Solutions in the  
2 fact -- in the ways that we've talked about.

3           *Lima* is the same sort of situation. You have all  
4 these subcontractors underneath a general contractor, and you  
5 have a couple guys underneath one of them who are suing the  
6 general contractor. And the court issues notice because the  
7 court found it's likely -- which is the standard of conditional  
8 certification -- it's likely that these other ones, even if  
9 they're subject to the rules and regulations or contracts of  
10 other subcontractors, that they'll be treated similarly.  
11 Because at the conditional certification stage we're not  
12 talking about a final decision that they're conditional -- that  
13 they are similarly situated. All it is is a preliminary one.  
14 That's why it's called conditional.

15           Now, at the end of discovery, when we've had time to  
16 flush out all of the facts and do all the depositions, get all  
17 the written discovery, then the defendants can, you know, make  
18 their motion for decertification. At that point the court  
19 makes a final determination of whether or not they're  
20 conditionally certified. At this point it's just: Is it  
21 they're likely to be similarly situated; it is have they raised  
22 enough evidence to show that there is a -- that there is a  
23 likelihood here that they could be similarly situated.

24           *Daugherty versus Encana Oil and Gas*. It's the same  
25 kind of thing. It's a staffing company. Staffing company --

1 actually, it's an oil company using many, many staffing  
2 companies, 40 of them, to provide oilfield pumpers. Now, there  
3 are huge differences among these staffing companies. Some of  
4 them had different pay arrangements, they operated under  
5 different contracts, they received different portions the  
6 staffing companies charges the oil company, some were  
7 classified as employees, some as independent contractors, some  
8 may have received overtime, some may have not. But the court  
9 looked at that situation and found that because -- the court  
10 was focusing on whether or not the oil company was engaging in  
11 a pattern or practice of not paying overtime by using these  
12 subcontractors. And at that early stage, you know, before all  
13 of the facts were before the court, the court says, well, yeah,  
14 they're -- they're similarly situated because they're not paid  
15 overtime and they're doing similar job duties. And, you know,  
16 through discovery we'll find out if there are differences that  
17 would merit decertification.

18           The *Mr. W. Fireworks* case. The *Mr. W. Fireworks* case  
19 nobody is saying that that's a strict seasonal test. In *Mr. W.*  
20 *Fireworks*, those fireworks stand operators worked two seasons a  
21 year. Or sometimes they only worked one and never came back.  
22 But it was like a 13-day New Year's and Christmas season, and a  
23 July 4th season lasts only 11 days. And if they worked both  
24 seasons, they would have been worked -- they would have worked  
25 24 days the entire year for Mr. W. and earning their income

1 somewhere else, apparently. But the fact that, you know,  
2 the -- the fireworks -- or Mr. W. tried to say: There's these  
3 super short, you know, time periods that they're working for  
4 us, so they're temporary employees. And the court said no.  
5 The Fifth Circuit said, no, they're full-time employees because  
6 they're working the season. We have to look at the  
7 operational -- or the intrinsic operational characteristics of  
8 the fireworks industry in *Mr. W.* And that is it's two short  
9 seasons, and if you work the season, you're a permanent  
10 employee.

11 Now, what *Mr. W.* is telling us is to look at the  
12 intrinsic operational characteristics of the oil industry. And  
13 the reality is, is that rigs go to a location, they rig up,  
14 they drill until they're done, they rig down until the next  
15 job. And that's what sit hands do. They get called when it's  
16 time to go to a rig, they show up, they can help rig up,  
17 they'll be there running all the solids control equipment while  
18 they're -- while they're drilling and drilling, until they're  
19 done. And then they go home; because that's what employees in  
20 this industry do.

21 Now, *Andel*, I think, failed to account for that.  
22 *Andel* said, well, because -- it was only a conditional  
23 certification order, but they were denied conditional  
24 certification because, I guess, there were some -- the Court's  
25 talking about some irregularities or a pattern of days worked

1 and days off and the invoice submissions. Well, we've looked  
2 at invoices in this case; they're not irregular. They're the  
3 15th and the 30th or the 31st. But the -- there are going to  
4 be varying lengths of time between assignments. That's not  
5 anything difficult to do. Total Screen Solutions knows exactly  
6 what days they worked; they have the payroll records that show  
7 what days they worked; we can put it into a chart and calculate  
8 damages. That's not a problem. And the fact that they are  
9 working, you know, for the rig for a -- while the -- while the  
10 rig is operating and they're off while it's not, well, that's  
11 *Mr. W.* That's the intrinsic operational characteristic we've  
12 got to account for. If they work from rig up to rig down, then  
13 they're permanently employed during that time. They get -- you  
14 know, they don't get regular weekends off like normal  
15 employees. They'll have maybe five or six days off between  
16 their rig and then they're back on. And they can be on for 30,  
17 40 days. You know, sometimes only 10 or 15. It just -- it  
18 does just depend. But, like I say, I don't think that impacts  
19 permanence. And the thing is they keep coming back. It's not  
20 like they worked one job with Total Screen Solutions and  
21 never -- never come back again. They work for the rig, they're  
22 off for a few days, they're on call, they get called, and the  
23 next couple hours they're back out there again, and nothing's  
24 changed. They didn't have to renegotiate their pay; they  
25 didn't have to bid for a project; they don't have to provide

1 anything; they just need to get there.

2           So, on *Baker versus Flint Engineering* out of the  
3 Tenth Circuit, they've done it right. There you have rig  
4 rollers --

5           **THE COURT:** I reviewed everything that was submitted,  
6 and a lot of these cases --

7           **MR. MOULTON:** Okay.

8           **THE COURT:** -- I've already read and reread  
9 throughout the briefing, so --

10          **MR. MOULTON:** Okay.

11          **THE COURT:** -- I don't know if you have anything  
12 outside of that to -- to respond.

13          **MR. MOULTON:** Okay. Well, there is a -- well, I'll  
14 just point out that -- that *UTI versus Patterson* -- *Andel* --  
15 was the case in Victoria that got -- that was decertified.  
16 That's one of the cases the defendants are relying on. Now,  
17 what happened after the decertification was that the plaintiffs  
18 went and filed their individual actions because they couldn't  
19 be in a, you know, collective action anymore. And we've seen  
20 the first summary judgment decision come out of the Eastern  
21 District, and that was cited in our most recent -- it's  
22 *Faulkner versus Patterson-UTI* combined with another plaintiff;  
23 you know, they're all -- they're original *Andel* guys. And the  
24 motion for summary -- well, the summary judgment then granted  
25 in plaintiff's favor, that they were employees, you know,



1 these -- these -- it's similar to the situation here. You've  
2 got welders who are subject to, you know, various rules and  
3 regulations, they -- you know, in the oilfield, and -- there is  
4 a -- you know, a case that we just noticed a couple days ago;  
5 it's also similar; *Randolph versus Powercomm Construction*.  
6 This one came out January -- or, I'm sorry -- March 25th, 2014.  
7 I don't think Mr. Pipitone has seen it; I'll give him a copy.

8 Well, in that case you have plaintiffs who are -- and  
9 if the Court would like a copy --

10 **THE COURT:** Okay.

11 **(Pause)**

12 **MR. MOULTON:** Here we have flaggers for a  
13 construction company. And the construction company is  
14 saying -- well, actually, it's -- it's a staffing and  
15 construction company. They staff them out to various other  
16 construction companies. And when they go work on other  
17 construction company sites, they have to do what the other  
18 construction companies say. The summary judgment granted --  
19 let's see. Well --

20 **(Pause)**

21 So, the -- well, the point of this case is that the  
22 defendant is arguing because they're subject to control of the  
23 assigned employer that they're -- that the control factor  
24 doesn't weigh in their favor. But that's not the way the court  
25 saw it.

1 "Because a reasonable jury could find that plaintiffs  
2 were controlled by defendants or by subcontractors to  
3 whom defendants had delegated their control, this  
4 factor weighs against summary judgment."

5 So, this was a -- actually denial of defendant's  
6 summary judgment, I believe.

7 And, so, we're not talking about some mysterious or  
8 novel or strange situation. This is a very common situation  
9 where you have workers assigned to work on somebody else's --  
10 on somebody else's site. And when we're looking at conditional  
11 certification, we're going to look at whether or not they're  
12 similarly situated for the company that's alleged to be the  
13 employer, which is in this case Total Screen Solutions.

14 That's all I have, your Honor, for now.

15 **THE COURT:** Thank you. Mr. Pipitone?

16 **MR. PIPITONE:** Thank you, your Honor. I clerked for  
17 a federal district court judge as a law clerk 34 years ago, and  
18 out of two things I learned, one is, obviously, that means I'm  
19 old; but, two, it also means that when the Court says they  
20 pretty much have made up their mind, either you don't say  
21 anything at all or you keep your comments very, very brief. If  
22 I could opt for that --

23 **THE COURT:** Or you might get the Court to change  
24 their mind.

25 **MR. PIPITONE:** On that note, your Honor, then, I

1 really don't have anything else to add, other than, if I may,  
2 that in this type of a case with misclassification being the  
3 issue, whether somebody is an employee or an independent  
4 contractor, you can't look at just the geography. We're not  
5 talking about the geography here. What we're talking about is  
6 whether the Court will apply the economic realities test, the  
7 five factors, if it can apply those factors to everybody in the  
8 class as though that class was one person. And here, because  
9 control is exerted by the company men, which is unequivocal,  
10 that's impossible to do. And that's the basis of our entire  
11 argument.

12               With that, your Honor, thank you, and look forward to  
13 your decision.

14               **THE COURT:** All right. Like I said, there was a lot  
15 of briefing provided; this is our second hearing on this  
16 matter; I've reviewed everything fully, and Court's going to  
17 grant plaintiff's motion for conditional certification. It is  
18 a lenient standard at this stage. Court finds the putative  
19 class members are similarly situated for purposes of this  
20 preliminary or conditional certification phase.

21               So, I would like for you all to confer about the  
22 order and the notice. I don't -- I have problems with the one  
23 proposed by the plaintiffs. You all can do that now; Brandy  
24 can e-mail you other ones I have approved in other cases that  
25 you all can work off to know what I am likely to approve and

1 not approve, or she probably has copies for you if you want to  
2 look at that now. But before you do that -- and you're welcome  
3 to do that today and so we can work through it, or do that on  
4 your own time. But there is a motion to compel discovery  
5 pending by the plaintiffs. Have you all conferred on that?

6 **MR. MOULTON:** We had a conversation on the phone  
7 about it before we filed, and we've also written letters back  
8 and forth.

9 **THE COURT:** Okay. But a conversation is not --

10 **MR. MOULTON:** Well, let me -- let me further -- your  
11 Honor, we've conferred on it at length, actually, because we've  
12 had several phone -- well, we've talked about it on the phone  
13 several times, and then we filed a meet and -- we sent them a  
14 meet-and-confer letter, and then we had a conference call with,  
15 I think, three of defendant's attorneys and went over the  
16 issues. And we weren't able to agree, and that's when we filed  
17 our motion.

18 **THE COURT:** So, everything that's set out -- it's a  
19 pretty lengthy motion -- has been addressed and not agreed to.

20 **MR. MOULTON:** Yes, your Honor. Now, there is a --  
21 some of the things that we have agreed to we haven't completed  
22 yet, but we're -- we're working on that. But if we need to  
23 bring those issues up, we will.

24 Now, the reason why the motion --

25 **THE COURT:** Well, it's pending; it wasn't ripe. I

1 have not -- I didn't ask for a shortened time frame on that,  
2 but I just wanted to see what we need to do to address that.  
3 Do we need to set that for a conference after defense has had a  
4 chance maybe to respond, or how do we get that moving?

5 **MR. PIPITONE:** Your Honor, a lot of the matters were  
6 addressed in our conference call, and many were agreed to; some  
7 were not. We could perhaps try to confer one more time to see  
8 if we can narrow that down for the Court --

9 **THE COURT:** Uh-huh.

10 **MR. PIPITONE:** -- so the Court's burdened as little  
11 as possible (indiscernible).

12 **THE COURT:** Okay. That would -- that would be good.  
13 And, then, if there are any issues remaining, let Brandy know  
14 so she -- we can get on the phone or whatever we need to do --

15 **MR. PIPITONE:** There --

16 **THE COURT:** -- to address those issues, but then  
17 streamline it for me to let me know -- imagine the defense will  
18 be filing a response or a joint submission to the Court  
19 regarding what the Court needs to focus on.

20 **MR. PIPITONE:** Your Honor, there is a motion pending  
21 for a summary judgment with respect to the defendant, Gary  
22 Mills.

23 **THE COURT:** I've reviewed that. I think it's  
24 premature at this point. So, I was going to discuss that  
25 today. I was going to deny it without prejudice, so, you know,

1 you all could certainly refile it. I just think with what's  
2 before the Court at this point there were fact issues.

3 **MR. PIPITONE:** Your Honor, I wonder if I may request,  
4 instead of denying it without prejudice, if you could simply  
5 hold it in abeyance until a sufficient opportunity for  
6 discovery --

7 **THE COURT:** I don't mind doing that, but you, as a  
8 federal -- former federal law clerk, would know that the  
9 motions -- as long as it's not sitting there for six months,  
10 I'm probably okay --

11 **MR. PIPITONE:** I recall filling out those reports for  
12 the judge, so --

13 **THE COURT:** So, I will leave it open, but if it gets  
14 a little further I may nudge you all to say, you know, we're  
15 going to terminate this and reconsider it later.

16 **MR. PIPITONE:** Well, or on the other hand, have the  
17 plaintiff go ahead and proceed with whatever discovery they  
18 need with respect to Gary Mills and get this over with.

19 **MR. MOULTON:** Your Honor, that's --

20 **THE COURT:** That's fine. I mean --

21 **MR. MOULTON:** -- that's exactly what we intend to do.  
22 We --

23 **THE COURT:** Okay. So, I will for purposes of now,  
24 then, just leave it open. I won't make a ruling on it and just  
25 think it's a little premature right now. You all do further

1 discovery; the motion will remain pending. You all are going  
2 to have to let me know, though, when I need to, when it's ready  
3 to go or you all are going to file additional pleadings  
4 regarding that motion.

5 **MR. PIPITONE:** Your Honor, with respect to the notice  
6 issue, to me, that is -- if there is going to be a conditional  
7 class certification, the notice is incredibly important to me.

8 **THE COURT:** I -- well, I agree, and I don't like the  
9 style of this. It seems a little like an advertisement instead  
10 of something authorized by a federal court.

11 **MR. MOULTON:** Your Honor, it's just a form that we've  
12 used in lots of cases, but I'm not married to that form.

13 **THE COURT:** Yeah.

14 **MR. MOULTON:** I mean, it's -- we can use the form you  
15 like.

16 **THE COURT:** I've had Brandy make some copies of prior  
17 orders and notices and consent forms that I've approved, so I  
18 don't know if you all want some time to look at that and try to  
19 submit an agreement to the Court, or just where we have maybe  
20 just a couple issues from -- for the Court to consider.

21 **MR. PIPITONE:** Your Honor, if this is amenable to the  
22 Court, perhaps just a brief discussion about a couple of  
23 things?

24 **THE COURT:** That's fine.

25 **MR. PIPITONE:** One, because this is coming out with

1 the imprimatur of the federal court, it should not look like an  
2 advertisement, which is precisely what this looks like: Please  
3 sign your case up to me.

4 **THE COURT:** And I've addressed that, so --

5 **MR. PIPITONE:** Yeah. So --

6 **THE COURT:** I think what you have before you, if you  
7 got a copy from Brandy, will show you what I'm inclined to do  
8 and look at.

9 **MR. PIPITONE:** Okay.

10 **THE COURT:** But also I think there was an issue when  
11 I was reading the briefs regarding the notice about attorneys.  
12 I'm not -- and I have addressed this in another case --  
13 inclined to -- I think any potential opt-ins need to be  
14 informed they can retain their own attorneys. I'm not going to  
15 bar people from opting in just because they have a different  
16 lawyer. I mean, all of this is about efficiency on the Court's  
17 part, too, and I don't see where that needs to be somewhere  
18 else, or filed as a different case. Whether they remain in or  
19 not later, I just kind of -- I noticed it was all directed -- I  
20 didn't see anything -- and it's been a little while since I  
21 reviewed what plaintiff proposed in detail -- but about them  
22 being able to contact someone else if they desired to do so.  
23 That being said, I don't have a problem with listing the main  
24 counsel for plaintiffs for questions. And you'll see that in  
25 some of the others I have. I don't tend to include the defense



1 counsel in there.

2           **MR. MOULTON:** Right; I see this one that -- the  
3 example, I think this is fine: If you have any questions, you  
4 know, you may contact them directly or you may contact any  
5 counsel of your choice. That's -- that's fine.

6           **THE COURT:** Okay. Just --

7           **MR. MOULTON:** Well, I just -- well, I didn't -- I  
8 thought that the -- yeah. No, my actual issue was something  
9 else. So, that -- that's -- I don't have a problem with that.

10          **THE COURT:** Okay.

11          **MR. MOULTON:** What I -- the main thing that I also  
12 can remember -- it's been a while for me, too, to remember --  
13 is on the consent form they need to be able to put their  
14 contact information. Because these are people that can get --

15          **THE COURT:** That's fine. But what are you --

16          **MR. MOULTON:** -- they can be subject to discovery.

17          **THE COURT:** What are you asking for?

18          **MR. MOULTON:** Well, they need to be able to give us  
19 their name, address, phone number, e-mail address.

20          **THE COURT:** I usually allow e-mail addresses.

21               What else? I thought there may have been a couple of  
22 other issues on --

23          **MR. PIPITONE:** There were, your Honor. If I  
24 understood correctly, you said that you would not allow the  
25 defense counsel to be on the notice in case --

1           **THE COURT:** I have not allowed that in the past. I  
2 mean, you can certainly, you know, bring that up; we can  
3 address it.

4           **MR. PIPITONE:** I would like to, because --

5           **THE COURT:** Okay.

6           **MR. PIPITONE:** -- your Honor, when anyone tries to  
7 make an intelligent decision, then it's always best to have  
8 both sides of the case. And, so, if somebody is given just one  
9 side of the case, it's impossible for them to make that  
10 informed decision. Now, I would like the opportunity to give  
11 the defense, just as Mr. Moulton definitely wants to have that  
12 opportunity to give the reasons why they should pursue an  
13 action and recovery. So, I would like people -- they don't  
14 have to, but we can put it in the notice -- they don't have to  
15 call either one of us. But both names and all the contact  
16 information should be provided with the instruction that they  
17 can choose to call one or both or none at all.

18           **MR. MOULTON:** Your Honor, we -- courts have looked at  
19 this, and most courts don't do it because the -- the defense is  
20 duty bound, has a total different interest in this case. The  
21 lawyers for the defendant are doing -- their job is to make  
22 sure they never get paid.

23           **THE COURT:** Have you been involved in cases where  
24 that's been allowed, Mr. Pipitone? Because I've just not seen  
25 it in what I've -- I've done in the last few years.

1           **MR. PIPITONE:** I would say, your Honor, I'm no more  
2           biased in favor of my client than Mr. Moulton is in favor of  
3           his. I mean, that's a ridiculous assertion. So, if -- that's  
4           one thing I would very much like to have the opportunity to do.

5           **THE COURT:** Have other courts allowed that?

6           **MR. PIPITONE:** I have not requested that of other  
7           courts, your Honor.

8           **THE COURT:** Yeah. I'll give you some time to look  
9           into that.

10          **MR. PIPITONE:** Okay.

11          **THE COURT:** I have not seen that in the matters I've  
12          had before the Court regarding the FLSA, so I have never been  
13          inclined to include that.

14          **MR. PIPITONE:** All right.

15          **THE COURT:** But if you want to look into that and let  
16          me know further, that's fine.

17                 What other issue on the notice from the plaintiffs?  
18          Anything?

19          **MR. MOULTON:** Your Honor, it --

20          **THE COURT:** And there may be --

21          **MR. MOULTON:** I know Andrew --

22          **THE COURT:** -- there may be issues that come up when  
23          you all --

24          **MR. MOULTON:** Right.

25          **THE COURT:** -- go through that and try to submit

1 something to the Court, but just generally, if there is  
2 something I can jump on.

3 **MR. MOULTON:** I'm sure this notice is fine. I know  
4 Andrew Dunlap very well. We do cases together, and if -- if  
5 this is something you've approved in one of his cases, I'm sure  
6 it's fine. If we follow this format, I'm sure it's going to  
7 work out.

8 **THE COURT:** Which one are you looking at, in  
9 particular? Because there were several.

10 **MR. MOULTON:** I'm looking at this *Durbin versus*  
11 *Advanced Pipeline*. Is there two?

12 **THE COURT:** Then, Mr. -- well, there are several, I  
13 believe, that we have conditionally certified, and I probably  
14 gave you -- two or three of them, Brandy?

15 **THE CLERK:** There's three cases --

16 **THE COURT:** Three cases?

17 **THE CLERK:** -- Durbin --

18 **THE COURT:** If you all want to review those --

19 **MR. MOULTON:** Okay. Here you go.

20 **THE CLERK:** -- (indiscernible) Martinez.

21 **THE COURT:** -- and then visit; maybe Mr. Pipitone can  
22 review what the Court has sent out in the past. You all try to  
23 submit something to the Court by agreement, and then let me  
24 know what's not agreed to, and I can flesh that out further.

25 **MR. PIPITONE:** And, your Honor, just so I don't chase

1 something that is not ever going to pass muster, in addition to  
2 having the plaintiff's version of the case, will the  
3 defendant --

4 **THE COURT:** Yes.

5 **MR. PIPITONE:** -- be permitted -- very good.

6 **THE COURT:** And all of those have a little -- should  
7 include what the defendant's position is.

8 **MR. PIPITONE:** Okay. One thing that we have done in  
9 the past is the putative members may -- may or may not want  
10 someone like James Lauterbach to be their class rep. So, we  
11 have asked that it be told to these putative class members that  
12 Mr. Lauterbach will be proceeding on their behalves.

13 **THE COURT:** I don't remember how we have raised -- I  
14 know we generally include the named plaintiffs in that notice,  
15 but I don't -- anything from the plaintiff on that?

16 **MR. MOULTON:** Well, I mean --

17 **THE COURT:** Because it -- I mean, they --

18 **MR. MOULTON:** Is --

19 **THE COURT:** Those named plaintiffs are proceeding on  
20 behalf of the others.

21 **MR. MOULTON:** Right. He -- I mean, I agree that  
22 certainly through discovery he's going to represent them, but I  
23 don't think even the defendants would agree that we can only  
24 put James Lauterbach on trial and decide for everybody --  
25 usually what happens, you decide on some subset of the class

1 that's representative --

2           **THE COURT:** Right, but he is proceeding on behalf of  
3 the class.

4           **MR. MOULTON:** He is.

5           **THE COURT:** So, I --

6           **MR. MOULTON:** Certainly.

7           **THE COURT:** -- I don't think that would be  
8 inappropriate to set that out.

9           **MR. MOULTON:** Right. I just -- my only thought was  
10 that I don't -- I don't think he's saying -- because what I  
11 also heard was: Are we going to have a trial with just James  
12 Lauterbach?

13           **THE COURT:** No.

14           **MR. MOULTON:** He's going to represent --

15           **THE COURT:** No, no.

16           **MR. MOULTON:** No, no. Right.

17           **THE COURT:** He's not saying that.

18           **MR. MOULTON:** Right, right. Right. So -- and, so,  
19 the plaintiffs need to know that, too, that James Lauterbach  
20 will be -- is a class representative for them, but their input  
21 and their situation is going to be taken into account.

22           **THE COURT:** Well, review what I've done, and I  
23 recall -- I thought at least one of those has something about  
24 the named plaintiffs representing the class. But if you want  
25 more, less -- I mean, just seen what you can agree to, and if

1 you can't, I will --

2 **MR. MOULTON:** Sure.

3 **THE COURT:** -- address it.

4 Any other --

5 **MR. MOULTON:** Your Honor, there is something coming  
6 up that we need to work on. I think -- I don't have my case  
7 calendar in front of me right now, but I think April 15th is  
8 our deadline to give a settlement demand.

9 **THE COURT:** You know, I'm afraid because this has  
10 been delayed somewhat --

11 **MR. MOULTON:** We need to --

12 **THE COURT:** -- that we're going to need to address  
13 the scheduling order --

14 **MR. MOULTON:** Right.

15 **THE COURT:** -- post, now, conditional certification.  
16 Mr. Pipitone?

17 **MR. MOULTON:** Why don't we -- oh, I'm sorry. I was  
18 going to say maybe we should confer and maybe we'd probably  
19 come together with an agreed scheduling order for a -- and  
20 propose it to the Court.

21 **MR. PIPITONE:** I'm sure we can work that out, your  
22 Honor.

23 **THE COURT:** That is fine.

24 **MR. PIPITONE:** Yeah.

25 **MR. MOULTON:** Well, it --

1           **MR. PIPITONE:** Using a lot of the deadlines you have,  
2 only use them from this day forward.

3           **THE COURT:** Uh-huh. That's fine.

4           **MR. MOULTON:** Yeah.

5           **THE COURT:** Okay. So --

6           **MR. MOULTON:** I was most concerned about that  
7 April -- I mean, that's coming right up, but we can move that,  
8 right? So --

9           **THE COURT:** Right. So, you all are going to confer.  
10 I don't know if you want to do that right now, if you want some  
11 time to look at that in a little more detail, and then maybe  
12 within a week have something submitted to the Court or let the  
13 Court know that we need to gather again so the Court can  
14 address any issues on the order and the notice and, I guess,  
15 the form, the consent form.

16           **MR. MOULTON:** Right.

17           **THE COURT:** Because you all will know better as to  
18 how much time the defense needs to provide certain things, so  
19 if you can draft that order also, which I believe there's  
20 copies in here of previous orders I've done --

21           **MR. MOULTON:** Right.

22           **THE COURT:** -- you all will know where it needs to be  
23 posted better than I do, and that's why I kind of throw it back  
24 on your hands, in your hands. So --

25           **MR. MOULTON:** Okay.



1           **MR. PIPITONE:** Very good.

2           **THE COURT:** Okay. If nothing else, you're excused.

3           **MR. PIPITONE:** One last question.

4           **THE COURT:** Okay.

5           **MR. PIPITONE:** Has your Honor ever used a third-party  
6 administrator to do the notices?

7           **THE COURT:** No, I never have.

8           **MR. PIPITONE:** Would it be something you'd consider  
9 if I can show you some authority?

10           **THE COURT:** You can submit anything at this point  
11 regarding the notice that you all don't agree on and, you know,  
12 I'll look at it. I just -- I don't know that I've even been  
13 asked in the past --

14           **MR. PIPITONE:** Uh-huh.

15           **THE COURT:** -- with the ones I have certified.

16           **MR. MOULTON:** Your Honor --

17           **MR. PIPITONE:** One major problem with all of this in  
18 any of these notices that go out is just the fact that it bears  
19 the Court's seal, so to speak, and has the people contacting  
20 just the plaintiffs' lawyers and sending the plaintiffs'  
21 lawyers everything, almost sounds like that they've been given  
22 the good stamp of housekeeping approval to the plaintiffs'  
23 lawyers, to the neglect of the defense lawyers.

24           **THE COURT:** I know. And that's -- you know, I came  
25 on the bench about two and a half years ago, and that's just

1 what has normally been done by the Courts. I'm not saying it's  
2 right or not; it's just kind of that's where the cases are,  
3 and, so, I've just kind of gone along with whatever has been  
4 approved or what the cases say is okay. I don't -- what's the  
5 plaintiffs' position on that?

6 **MR. MOULTON:** Your Honor, well, the -- I mean, all of  
7 the notices that I do always have a section in there -- and I'm  
8 sure these probably do, too; I haven't read them in full --  
9 that make it explicitly clear that you're not saying either  
10 way.

11 **THE COURT:** I have authorized the notice, but I'm  
12 certainly not --

13 **MR. MOULTON:** Right. Plaintiffs are given -- you  
14 know, they get to say what the case is about; defense gets to  
15 say what the case is about. Now, the -- the third-party  
16 administrator you'll see in huge cases where there's going to  
17 be thousands of people and not one firm can really handle the  
18 intake, right? That's not this case.

19 **THE COURT:** No, I understand --

20 **MR. MOULTON:** Yeah. But --

21 **THE COURT:** -- the concern from the defense  
22 perspective.

23 **MR. MOULTON:** Right.

24 **THE COURT:** However, I think --

25 **MR. MOULTON:** Well, what I was going to say --

1           **THE COURT:** -- normally we've worked this way and it  
2 generally has not been a problem.

3           **MR. MOULTON:** Right.

4           **MR. PIPITONE:** Well --

5           **MR. MOULTON:** And the thing that's real important for  
6 people, if they're going to join a lawsuit, they often have a  
7 lot of questions; they need advice.

8           **THE COURT:** I know, but that's the issue he has --

9           **MR. MOULTON:** Right. Well --

10          **THE COURT:** -- is they're going to be getting that  
11 from you.

12          **MR. MOULTON:** Right. Well, they're going to --

13          **THE COURT:** Without the other side.

14          **MR. MOULTON:** You know, I have people call me all the  
15 time, you know -- I speak Spanish, so I get all the Hispanic  
16 clients, and they'll call me up and they'll say: How -- how --  
17 if I join this lawsuit, how is it going to affect my  
18 immigration stuff? You know, how is it going to affect my  
19 probation? Or, I need to go to so-and-so. Right? And, you  
20 know, we're not going to have a lot of -- maybe not necessarily  
21 that, the immigration issues or those kind of issues, but  
22 you're going to be -- you know, how does this affect my divorce  
23 proceedings, or how does this -- how does this affect my  
24 ability to get employment later? People have -- or how does it  
25 affect other legal issues they have. And, so, if they are

1 only -- if they could only talk to a third-party administrator,  
2 who can't answer those questions for them, that's -- that's not  
3 right; that's not helping them.

4           **MR. PIPITONE:** And, your Honor, too, I will say this.  
5 If it doesn't go to a third-party administrator, if both of us  
6 are put down, I will just say this to the Court. I have never  
7 in my entire career won a hearing or a trial when I didn't show  
8 up. And, so -- in fact, I can say I lost every one of them.  
9 And, so, that's what we have here. If we can't have both of us  
10 commenting and let somebody decide, then it's just a one-sided  
11 proposition.

12           **THE COURT:** Yeah, the only -- the problem, I think,  
13 sometimes with the defense, I would think, and why I generally  
14 don't see or I have never seen where they have been submitted,  
15 is because the FLSA is so particular about being careful with  
16 the defendant, and the defense attorney who's representing the  
17 defendant, there being any sort of -- and I think there are  
18 some notices or some examples about no retaliation or  
19 blackballing or anything like that by the defense, and I would  
20 hate to open up that can of worms; "Well, we called the defense  
21 lawyer" -- not that you would do that; I'm just saying people  
22 could make some claims -- "and he told me, you know, I'd better  
23 not participate." Not that you would do that; it's just there  
24 are some restrictions on some -- I think a couple of those  
25 examples have, you know: You're informed the defendants can't

1     retaliate, blackball, whatever it is, against you if you do  
2     this. And, you know, I could maybe see some problems, not that  
3     you would do anything, but where plaintiffs would later say,  
4     "Well, I wanted to join, but the defendant's lawyer told me X,  
5     Y, and Z," and -- I don't know.

6                 **MR. PIPITONE:** How about if I research it and give  
7     you some cases, your Honor, and --

8                 **THE COURT:** You certainly can. I mean, you all are  
9     going to go off, try to figure it out, what you can agree to,  
10    and what you don't I'll be glad to look at. Right,  
11    Mr. Moulton?

12                **MR. PIPITONE:** And my whole thought process, your  
13    Honor, is just as the Court just indicated a defendant could --  
14    and I know that's just generically --

15                **THE COURT:** Uh-huh.

16                **MR. PIPITONE:** -- could influence, harass,  
17    threaten --

18                **THE COURT:** Or allegations that there has been  
19    that --

20                **MR. PIPITONE:** Right.

21                **THE COURT:** -- which would then open up a whole  
22    another side issue for the Court.

23                **MR. PIPITONE:** But just -- just as that could be with  
24    the defendant, it could also be to the plaintiffs' lawyer; is  
25    he guilty of solicitation?

1           **THE COURT:** Right, but I'm just concerned about, you  
2 know, with the FLSA, kind of lays out some things that  
3 defendants have to be concerned --

4           **MR. PIPITONE:** Uh-huh.

5           **THE COURT:** -- you know, be careful about.

6           **MR. PIPITONE:** Yeah. I understand.

7           **THE COURT:** Okay. So, about a week to see what you  
8 all can get done?

9           **MR. PIPITONE:** Very good, Judge. Thank you.

10          **MR. MOULTON:** Thanks.

11          **THE COURT:** All right. Thank you. And you all are  
12 going to also gather on the discovery issue.

13          **MR. PIPITONE:** Yes.

14          **MR. MOULTON:** Certainly.

15          **THE COURT:** All right. You can be excused.

16          **MR. MOULTON:** Thank you.

17          **(Proceeding was adjourned at 2:24 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is positioned above a horizontal line.

April 14, 2014

TONI HUDSON, TRANSCRIBER